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No.

In The

Supreme Court of the United States

October Term, 1994

JAMES S. COX,

Petitioner,

vs.

WILLIAM P. NEWTON, and
ATTORNEY GENERAL OF THE STATE OF TENNESSEE,

Respondents.

On Petition For A Writ Of Certiorari To the Supreme Court Of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented for review in this Petition for Writ of Certiorari are:

1. Whether statutory limits upon contingent attorney fees of Plaintiffs' counsel in common law, medical malpractice actions violate the Fourteenth Amendment's Equal Protection and/or Due Process Clauses?

2. What is the appropriate standard of review, under the Fourteenth Amendment, of statutory limits upon contingent attorney fees of Plaintiffs' counsel in common law, medical malpractice actions?

3. Whether statutory limits upon contingent attorney fees of Plaintiffs' counsel in common law, medical malpractice actions unconstitutionally burden and discriminate against the poor and the poor's access to counsel and courts?

4. Whether statutory limits upon contingent attorney fees of Plaintiffs' counsel in common law, medical malpractice actions unconstitutionally discriminate against Plaintiffs' and Plaintiffs' counsel's right to contract?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the Supreme Court of Tennessee.

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James S. Cox, Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Tennessee, entered in the above-entitled case on May 9, 1994.

OPINIONS BELOW

The May 9, 1994 opinion of the Supreme Court of Tennessee, Case No. 02-S-01-9302-CH-00007, whose judgment is herein sought to be reviewed is unpublished, and is reprinted in the separate Appendix 1 to this Petition, pp. App. 1-18. The prior opinion of the Court of Appeals

of Tennessee, Western Section at Jackson, entered September 14, 1992, Case No. 02-A-01-9202-CH-000041, is unpublished, and is reprinted in the separate Appendix 2 to this Petition, pp. App. 19-31. The prior opinion of the Chancery Court of Tennessee, entered June 19, 1991, Case No. 95205-3, is unpublished, and is reprinted in the separate Appendix 3 to this Petition, pp. App. 32-34.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on May 9, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Tennessee Code Annotated (T.C.A.) § 29-26-120, which provides as follows:

Compensation for reasonable attorneys' fees in the event an employment contract exists between the claimants and his attorney on a contingent fee arrangement shall be awarded to the claimant's attorney in a malpractice action in an amount to be determined by the court on the basis of time and effort devoted to the litigation by the claimant's attorney, complexity of the claim and other pertinent matters in connection therewith, not to exceed thirty-three and one-third percent (33 1/3%) of all damages awarded to the claimant.

STATEMENT OF THE CASE

The genesis of this lawsuit was a stroke which Respondent William P. Newton ("Newton" or "Respondent") suffered on February 21, 1984, during an angioplasty procedure in the Baptist Memorial Hospital at Memphis. Respondent was transported by air ambulance to the Duke University Hospital, Durham, North Carolina, for treatment in its hyperbaric oxygen chamber. Mr. Newton was in a coma for four days and remained at the Duke University Hospital until March 20, 1984, when he was transferred to the Emory University Hospital at Atlanta, Georgia, for further rehabilitative care.

While Mr. Newton was a patient in the Duke University Hospital, he and his wife, Shirley, talked about getting an attorney to investigate his case to determine whether he had a legal claim for the injuries he had sustained during the angioplasty procedure. Mrs. Newton traveled from Durham to Atlanta to make arrangements at the Emory University Hospital and then

proceeded to Memphis where she interviewed two lawyers, Blanchard Tual and James S. Cox, as prospective attorneys to handle their lawsuit. The decision to seek an attorney was a mutual idea of both Mr. Newton and his wife, Shirley.

After meeting with Mr. James S. Cox, Mrs. Newton took an employment contract for legal services, containing a contingent fee of fifty percent (50%) of any settlement or judgment, back to Atlanta where she discussed it with Mr. Newton.

Mr. Newton and his wife discussed her meeting with Mr. Tual and Mr. Cox and jointly agreed to employ Mr. Cox. They both fully entered into and signed the Employment Contract on March 25, 1984, in the presence of Mrs. Newton's daughter, Sandy Routon, who also signed the contract.

Mr. Cox and his office staff worked diligently on this case and filed the lawsuit, in the Circuit Court of Tennessee at Memphis, on June 20, 1984. The case was settled on June 14, 1985, for $225,000.00, which settlement was approved by Mr. Newton and Mrs. Newton with the full understanding that there would be an attorney fee of fifty percent (50%). Both Mr. and Mrs. Newton were satisfied and pleased with the result (settlement) accomplished.

On October 8, 1987, Respondent, William P. Newton, sued Petitioner, his former attorney, James S. Cox, alleging Mr. Cox violated T.C.A. § 29-26-120 by charging a contingent fee in a common law, medical malpractice action in an amount greater than thirty-three and one-

third percent (33⅓%). James S. Cox filed an answer alleging, at the earliest opportunity, T.C.A. § 29-26-120 is unconstitutional, and, in particular, stated:

> The Defendant charges and avers that T.C.A. 29-26-120 is UNCONSTITUTIONAL under the Constitution of the United States and the Constitution of the State of Tennessee.
>
> . . .
>
> The Defendant charges and avers that T.C.A. 29-26-120 is UNCONSTITUTIONAL under the Due Process and Equal Protection Guaranties of the United States Constitution, 14th Amendment, because by its terms and provisions, it deprives private citizens of their unalienable right to contract.

The Attorney General of Tennessee intervened for the limited purpose of defending the constitutionality of the challenged statute.

The Rulings Below

After the case was tried in the Chancery Court of Tennessee, the Chancellor found that T.C.A. § 29-26-120 is unconstitutional under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

The Attorney General of Tennessee and Respondent, William P. Newton, each lodged appeals in the Court of Appeals of Tennessee.

The Court of Appeals reversed the Chancellor's decision that T.C.A. § 29-26-120 is unconstitutional. It instead disposed of this issue in Petitioner Cox's favor by means

of statutory construction and application. The Court of Appeals held that the statute is directed to the judiciary, and, therefore, no cause of action is available against an attorney for its violation.

The Supreme Court of Tennessee ruled that T.C.A. § 29-26-120 is constitutional, reversed the Court of Appeals, and remanded the case to the Chancery Court.

REASONS FOR GRANTING CERTIORARI

The judgment of the Supreme Court of Tennessee should be reviewed because:

1. There is increasing conflict among the states as to whether the Fourteenth Amendment prohibits statutory limits upon contingent attorney fees of plaintiffs' counsel in common law, medical malpractice actions.

2. There is need for the Supreme Court's announcement of the appropriate standard of review or scrutiny, under the Fourteenth Amendment, of statutes limiting contingent attorney fees of plaintiffs' counsel in common law, medical malpractice actions.

3. Statutory limits upon contingent attorney fees of plaintiffs' counsel in common law, medical malpractice actions unconstitutionally discriminate and burden the poor's access to counsel and courts.

4. This case concerns one of the most important, immediate public issues of our time, the constitutional limits of legislative reform of medical malpractice litigation and the impact of such on health care.

5. One of the courts hearing this case has held that the Tennessee statute in question violates the Fourteenth Amendment's Equal Protection *and* Due Process Clauses.

This case concerns one of the most important and timely issues confronting America: regulation and reform of health care and medical malpractice litigation. More importantly, this case concerns the constitutional rights of citizens, namely, medical malpractice plaintiffs and their attorneys, under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Specifically, this case concerns state regulation of the right to contract, the right to counsel, the right to access the courts; in particular, the equal and non-discriminatory right of the poor to access counsel and courts in common law, medical malpractice actions. Furthermore, this case concerns the sharp disagreement among the states in interpreting and applying the Fourteenth Amendment to limitation of contingent attorney fees.

A number of states, such as Tennessee and New Hampshire, have already adopted statutes limiting contingent attorney fees of plaintiffs' lawyers in medical malpractice actions. This case arose in Tennessee and resulted in a direct challenge to the constitutionality of such a statute – Tennessee Code Annotated § 29-26-120.

The trial court, the Chancery Court of Tennessee, ruled that the statute, along with many other infirmities, violates both the Equal Protection and Due Process Clauses. The Court of Appeals of Tennessee construed the statute as not applying to contracts between clients and their attorneys, but only upon court-ordered fees.

The Supreme Court of Tennessee reversed the lower courts and found that the statute applied to contracts between plaintiffs and their attorneys. In reaching its decision, the court rejected the conclusion that the statute violated the Fourteenth Amendment's Equal Protection and Due Process Clauses.

The Supreme Court of Tennessee's reasoning that the statute does not violate the United States Constitution is in direct opposition to the reasoning of a number of courts, especially the Supreme Court of New Hampshire and the Supreme Court of Florida.

In sharp contrast to the Tennessee decision, the Supreme Court of New Hampshire held in the case of *Carson v. Maurer*, 424 A.2d 825, 839 (N.H. 1980):

> The relationship between this provision and the overall purpose of RSA ch. RSA 507-C (Supp.1979) – the containment of medical injury reparations system costs – is questionable. There is no "direct evidence that juries consider attorney's fees in coming to a verdict . . . " and "at least one study shows that juries do not include an assessment of the lawyer's contingency fee in their allotment of damages." Jenkins, 52 S.Cal.L.Rev. at 943. Reapportionment of damage awards, therefore, is likely to have an insignificant effect on the size of awards, thereby doing little to reduce medical malpractice insurance rates or to control health care costs.
>
> Moreover, RSA 507-C:8 (Supp.1979) unfairly burdens malpractice plaintiffs and, to a lesser extent, their attorneys. The regulation of attorney's fees solely in the area of medical malpractice inevitably will make such cases less

> attractive to the plaintiff bar. Consequently, RSA 507-C:8 (Supp.1979) "will at least somewhat deter the litigation of legitimate causes of actions, thus creating a potential impediment to injured individuals' access to courts and counsel." Jenkins, *supra* at 944. This statute also unjustly discriminates by interfering with the freedom of contract between a single class of plaintiffs and their attorneys. It does not regulate contingency fees generally not [sic] does it apply to defense counsel in medical malpractice cases, whose fees consume approximately the same percentage of the insurance premium dollar as do those of the plaintiff bar. *Id.* at 943 n. 687. We therefore hold that RSA 507-C:8 (Supp. 1979) is unconstitutional.

The Supreme Court of Tennessee recognized the existence of the conflicting New Hampshire holding, but refused to adopt its analysis under the Fourteenth Amendment, stating:

> We recognize that the New Hampshire Supreme Court found that a similar statute was unconstitutional, on the basis that there was no direct evidence in that case showing the relationship between the statutory classifications and the purposes of the legislation.

App. 12.

From reading the above cited portions of *Carson v. Maurer*, it is apparent that the Tennessee court incorrectly and too narrowly stated "the basis" of the New Hampshire court's decision, for the New Hampshire court focused upon discrimination against a single class of plaintiffs and plaintiffs' attorneys.

Therefore, under the conflicting decisions, the United States Constitution currently means one thing in New Hampshire and another in Tennessee. This conflict needs to be resolved, especially in light of today's reform environment, where legislatures, and now the Congress, are struggling with such vital public issues. Without guidance from the Supreme Court, this disagreement will only increase as more legislatures, courts, and Congress grapple with such questions and continue to reach inconsistent interpretations of the Constitution.

A threshold question is, what test should apply in reviewing such statutes? Should courts apply the Rational Basis Test or a form of heightened scrutiny?

An important or fundamental right that is affected by T.C.A. § 29-26-120 is the plaintiff and his attorney's right to contract for a reasonable attorney fee for providing legal services in common law, medical malpractice litigation. The right to contract has been found to be an inalienable right of a citizen and a property and/or liberty right protected by due process. *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1 (1927).

The fact that an important or fundamental right may have some restrictions imposed; for example, the right to vote where registration is required and at a fixed location within prescribed hours, does not alter or change the fact that a fundamental right is involved; therefore, the impact of the statute at issue should receive a form of heightened scrutiny. In this case, the Court should inquire into the real effect of T.C.A. § 29-26-120 to determine whether there is a substantial relationship to a legitimate government purpose. The Supreme Court of

New Hampshire found no such purpose with a similar enactment.

Petitioner contends the Court should announce a heightened form of scrutiny to determine whether there is a legitimate relationship between the expressed purpose for the Tennessee Medical Malpractice Review Board and Claim Act – to insure the availability of medical malpractice insurance for a reasonable premium – and a statute that limits the contingent attorney fee paid from a settlement or judgment.

In *In the Matter of the Florida Bar*, 349 S.2d 630 (Fla. 1977), the Supreme Court of Florida considered an amendment to the Florida Code of Professional Responsibility which would have imposed a maximum contingency fee schedule.

The Florida court rejected the proposed amendment and found there is no support for the contention of abuse of the contingency fee system and further found that plaintiffs are protected by the "open marketplace" self-regulatory system, as well as safeguards in the code of professional responsibility requiring a reasonableness standard. Because of the rights involved, the Florida court applied a heightened form of scrutiny, but, nevertheless, went on to conclude that such regulation cannot even surpass the minimal Rational Basis Test.

In the most thorough judicial discussion of contingent fee limitation in light of decisions of the Supreme Court of the United States, the Supreme Court of Florida found the following:

> However, due to the absence of competent evidence demonstrating any significant abuse of

> contingent fee arrangements within the State, we reject the proposed amendment which would impose a maximum contingent fee schedule and thereby impinge upon the ***constitutional guarantee of freedom of contract.*** Although the full implications of the recent decision of the United States Supreme Court in *Bates v. State Bar of Arizona*, ___ U.S. ___, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), have yet to manifest themselves, the approval of lawyer advertising therein should result in a greater awareness in the public concerning attorneys' services and fees. Thus the "open marketplace" competition promoted by such broader dissemination of information, in and of itself, should tend to be a self-regulating factor in the establishment of fees. The advent of this decision reinforces the conclusions we reach today with respect to the propriety of this Court establishing maximum fee schedules.

Id. at 632 (emphasis added).

> On the basis that the contingent fee is the "poor man's key to the courthouse" our Code of Professional Responsibility, patterned after the American Bar Association proposal, expressly sanctions the contingent fee arrangement. It cannot be denied that there is current today in some quarters a dissatisfaction with the principle of the contingent fee arrangement regardless of its amount. However, the advocates of this school of thought do not limit their assault to the contingent fee. Basically, their philosophy encompasses the idea that claims should be limited because of ***economic considerations.***

Id. at 633 (emphasis added).

> ***It is irrefutable that the poor and least fortunate in our society enjoy access to our courts, in part, because of the existence of the contingent fee.*** Until such time as the people of our State enunciate a different philosophy in their document of fundamental and organic law, ***we are not disposed to elevate economic considerations above right of access to the courts of this State.***

Id. (emphasis added).

> Apart from the lack of demonstrated necessity for imposing an arbitrary maximum fee schedule in contingent fee arrangements, there exists the very real question of infringement of the constitutional rights guaranteed to all citizens to make their own contracts ***absent any demonstrable, overriding public policy to be served by limiting such right.***

Id. at 634 (emphasis added).

> [F]reedom of contract is subject to reasonable restraint in the interest of the public welfare. . . . But if it appears that the regulation under criticism is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have ***no real and substantial relation*** to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the legitimate bounds of the police power may be exceeded. *Atlantic Coast Line R.R. Co. v. Goldsboro*, 232 U.S. 548, 34 S.Ct. 364, 58 L.Ed. 721 (1914).
>
> Not only is there a paucity of evidence that any significant evil is being advanced through utilization of the contingent fee arrangement under the criteria currently enunciated in the Code of

> Professional Responsibility when measured against the right of the poor to access to our courts, there is a ***complete absence of any evidence*** that the proposed maximum fee schedule in contingent fee cases has any real or substantial relation to the cure of the espoused evil. In fact, the converse appears more likely.

Id. at 634-35 (emphasis added).

> On the record, briefs and argument before us ***there is no more rational basis*** to adopt as a part of our Code of Professional Responsibility the suggested maximum fee schedule than there is to establish such a maximum on the fees contracted for by architects, engineers, accountants or physicians, to name a few similar professions, for their activities to affect the public interest. It may be that to do so would lower the costs of such professional services, although there is no such guarantee. It is just as likely that the result would be to diminish the quality of service clients of these professions would receive or eliminate the services altogether for some. ***Accordingly, where is the rational basis for the proposed regulation?*** . . .

Id. at 635 (emphasis added).

In the case of *Coburn v. Agustin*, 627 F.Supp. 983 (D.Kans. 1985), the court reviewed a Kansas medical malpractice statute dealing with the collateral source rule. It considered the nature of the class burdened, the importance of the rights affected, the extent the rights were impaired, as well as the balance between that impairment and a significant government interest in order to determine whether the legislative classification was legitimately related to the objects of the statute.

In *Coburn*, the court concluded that the ultimate purpose of the medical malpractice statute – to insure quality health care for Kansas citizens – was not sufficiently related to the legislative means of affording health care providers with a method of reducing their liability for damages. The court found the relationship to be attenuated at best.

In *Kenyon v. Hammer*, 688 P.2d 961 (Ariz. 1984), the court used a strict scrutiny test to evaluate the "fundamental right" of a patient to bring and pursue a medical malpractice action which was threatened by a statute which abolished the right to discovery in medical malpractice actions.

The court in *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984), used a serious and genuine inquiry in determining whether a three year statute of repose for negligent diagnosis in medical malpractice cases violated the state's equal protection clause.

In *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983), the court considered a statute that would reduce the statute of limitations for minors to bring a cause of action for medical malpractice and found that it abridged due process rights. It made this ruling after "balancing" the common law rights against the purpose and basis for the statute.

As previously noted, the New Hampshire Supreme Court, in a remarkably similar lawsuit to the case at bar, *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980), addressed the constitutionality of a New Hampshire statute that limited the contingency fee that could be charged by a plaintiff's attorney in a medical malpractice case.

The court explained its use of a more ***rigorous judicial scrutiny*** than that required under the rational basis test when interpreting constitutional issues in which ***important substantive*** rights are involved. The court questioned whether the statute had a fair and substantial relation to the legislative objective of containing medical injury reparation system costs or whether it imposed an unreasonable restriction on private rights.

The court found no direct evidence that jurors consider attorney fees in coming to a verdict and that at least one study showed that jurors do not include the assessment of the attorney's contingent fee when fixing damages.

The court concluded that a reapportionment of damage award between a medical malpractice plaintiff and his attorney is not likely to have a significant effect on the size of jury verdicts, and, thus, there would be no corresponding decrease in medical malpractice insurance premiums or the supposedly corresponding health care costs.

The court in *Carson* also found that a contingency fee limitation in medical malpractice cases unfairly burdened the malpractice plaintiff and to a lesser degree, his attorney by: (1) deterring litigation of legitimate causes; (2) potentially impeding access to courts and counsel; (3) interfering with the freedom to contract between a single class of plaintiffs and their attorneys; and (4) failing to regulate medical malpractice defense attorneys whose fees consume approximately the same percentage of the insurance premium dollar as do those of the plaintiffs' bar. *Carson, supra* at 839.

The court found the statute to be unconstitutional because it did not have a fair and substantial relation to the legislative objective of containing medical injury reparation system costs and to the contrary, the statute imposed unreasonable restrictions on the private right to contract.

The right and liberty to contract is a property right protected by the Due Process Clause. The significance of the freedom to contract is apparent in the free market system. The liberty and right of the medical malpractice plaintiff, and plaintiff's attorney, to contract freely is severely burdened by T.C.A. § 29-26-120, which limits the contingency fee that may be charged in a medical malpractice action.

The denial of the medical malpractice plaintiff's attorney's right to freely contract creates at least two legislative classifications. The medical malpractice plaintiff's attorney is singled out from the pool of plaintiff's attorneys in general, and within the medical malpractice field itself, is treated differently from the medical malpractice defense attorney. These legislative classifications, which deny a particular group their important constitutional rights, are invalid under the Equal Protection and Due Process Clauses when the relationship between the legislative purpose of the statute and the classification used to attain that goal is examined using even a minimal standard of review.

The ultimate ostensible goal of medical malpractice statutes providing for differential treatment of medical malpractice cases is to ensure adequate and affordable health care for citizens. When the means to attain this

goal is by a classification limiting only medical malpractice plaintiff's attorneys in the fee they can permissibly charge, any relationship between the ultimate goal and the means used should be highly suspect.

Even if the existence of a medical malpractice insurance "crisis" is hypothetically presumed, a rational relationship between the contingency fee limit and the increased availability of medical malpractice insurance to health care providers leading ultimately to improved availability and adequacy of health care remains to be shown.

It is especially interesting to note that the Tennessee General Assembly did not seem concerned with the amount of fee charged by the medical malpractice defense attorney, whose fees consume approximately the same percentage of the insurance premium dollar. *See, Carson, supra,* citing R. Scott Jenkins and Wm. C. Schweinfurth, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge,* 52 S. Cal. L. Rev. 829, 943 n.687 (1979). In fact, defense attorneys' fees are paid directly by malpractice insurers, and, therefore, defense fee limits would have a far greater potential for decreasing premiums. *Jenkins* at 943.

Besides the burden on the medical malpractice plaintiff's attorney in the loss of his right to contract freely and the potential injury to the public in lower standards of health, T.C.A. § 29-26-120 also has an adverse effect on another class – a class of medical malpractice plaintiffs who are not wealthy enough to pursue a common law, medical malpractice claim on other than a contingency

fee basis and whose claim is such that the medical malpractice plaintiff's attorney will not be able to accept the case unless a reasonable contingency fee higher than thirty-three and one-third percent (33 1/3%) is charged.

This class of plaintiffs also has important constitutional rights involved: the right to contract protected by the Due Process and Equal Protection Clauses of the United States Constitution, and the right to petition the government for redress of grievances guaranteed by the First Amendment of the United States Constitution through the Fourteenth Amendment, which includes the right of access to the courts for disposition of civil cases. *See Roa v. Lodi Medical Group, Inc.*, 695 P.2d 164, 175 (1985) (Bird, C. J., dissenting); *California Transp. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *United Transport Union v. Michigan Bar*, 401 U.S. 576 (1971).

Tennessee Code Annotated § 29-26-120 only limits the contingent attorney fees of plaintiffs. It does not affect the attorney fees of defendants. Thus, defendants are permitted to spend whatever they desire in defense, yet the plaintiff is only permitted to contract to pay contingently for counsel in the amount the statute permits, regardless of how complex, time consuming, difficult, and expensive the case may be to prosecute. Therefore, the state unequally and unfairly treats plaintiffs. More important, and more offensive to the Fourteenth Amendment, poor plaintiffs are discriminated against as opposed to plaintiffs of financial means.

The wealthy plaintiff, like defendant doctors and liability insurance companies, can pay any amount whatsoever in ***hourly*** fees to their counsel. The hourly fees charged do not have to have any relationship whatsoever to the amount of the judgment or settlement eventually obtained.

Often, the meritorious but difficult malpractice case will not attract competent representation when the maximum fee recoverable is only thirty-three and one-third percent (33⅓%). Accordingly, the more difficult and closer cases, although certainly deserving of access to the judicial system, are excluded from the system because poor plaintiffs cannot afford hourly fees, and the plaintiffs' counsel cannot afford to take the case for the limited contingent fee.

The poor malpractice plaintiff is precluded from using his bargaining power, or the financial resource of his potential recovery, in securing a skilled malpractice lawyer, while the wealthy malpractice plaintiff, with a case of exactly the same facts, can freely contract to pay hourly fees at whatever amount he can and will pay to secure the representation he needs. Therefore, this statutory scheme unduly burdens and precludes poor litigants from counsel and courts.

The United States Supreme Court's analysis concerning access to courts for divorce is applicable to medical malpractice actions. In the decision of *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court, Justice Harlan writing, pronounced the following:

> [T]his Court has seldom been asked to view access to the courts as an element of due process. The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain.

Id. at 375-76.

> Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.

Id. at 376-77.

This presents the inquiry as to whether access to the courts with skilled malpractice counsel in medical malpractice actions is "the only effective means of resolving the dispute." A commentary on the relationship between the medical malpractice contingency fee statute, the goal of adequate health care, and the indispensability of skilled malpractice counsel as the only effective means of resolving the dispute has been set forth in the law review note, *Medical Malpractice and Contingency Fee Controls: Is the Prescription Curing the Crisis or Killing the Patient?*, 19 Loy. L.A.L. Rev. 623, 661 (1985) (emphasis added), stating that:

> If taken to its logical extreme, this rationale of using a contingency fee limit to reduce defense insurance expenses would conclude that limiting an attorney fee to one dollar would dramatically reduce litigation cost and settlement expenses, and enable the client to retain the maximum share of any recovery. In a perfect world, victims would not need to spend any money at all for an attorney in order to obtain compensations for their injuries. ***But, for many malpractice victims, the opportunity to obtain any settlement comes only with the selection of capable attorneys who have successfully prosecuted medical malpractice cases and earned a reputation commanding respect from the defense. Without such representation, plaintiffs would never be in a position to begin negotiating a settlement, let alone to obtain adequate compensation for their injuries. By inhibiting access to reputable attorneys, costs to defendants and their insurers might be reduced, but at what price?***

Petitioner has standing to raise the issue of the effect of T.C.A. § 29-26-120 upon the poor. As the Court has pronounced:

> When, however, enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist. . . . A restriction upon the fees a lawyer may charge that deprives the lawyer's prospective client of

> a due process right to obtain legal representation falls squarely in this principle.

U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 720 (1990).

Petitioner realizes that the Court has upheld a variety of legislative schemes limiting the amount lawyers may collect from certain clients in certain types of representation, and even as far as effectively preventing lawyers from being paid, against challenges that such limitations violate freedom of contract and due process. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985); *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715 (1990).

However, such cases are easily distinguishable from the case at bar, for unlike the cases previously decided by the Court, this Tennessee statutory limitation affects a *common law* right of action, not a proceeding *created* by statute.

In 1925, the Court upheld a Nebraska statute prohibiting a lawyer from charging whatever fee the lawyer negotiated for representing a client in a worker's compensation case. *Yeiser v. Dysart*, 267 U.S. 540 (1925). Worker's compensation cases, however, are not common law, but are created by legislation; thus, the legislative power can set the terms and limitations upon the action, even to the extent of foreclosure. The action would not exist at all except for the legislature, so what the legislature gives, it can severely restrict or even take away.

In 1985, the Court sustained a federal limitation of ten dollars on the fees lawyers can collect for representing members of the armed forces who seek disability benefits from the Veteran's Administration. *Walters*,

supra. However, Veteran's Administration claim's proceedings, like worker's compensation proceedings, are solely a creature of the legislature.

As noted by the Court, disability claims should be processed in a non-adversary forum "designed to function throughout with a high degree of informality and solicitude for the claimant." *Id.* at 3184. This administrative process is deliberately designed by Congress "in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer." *Id.* at 3189.

There is, therefore, a legitimate, articulated, non-discriminatory reason for purposely excluding lawyers from this legislatively crafted, administrative process. The opposite is true for hotly contested common law, medical malpractice litigation, where highly skilled counsel is indispensable to access the courts and obtain recovery for injuries, injuries which are often of the most horrible and debilitating nature.

Tennessee Code Annotated § 29-26-120 is not designed to make medical malpractice litigation non-adversarial or informal, but ostensively to limit health care costs. But the true result of T.C.A. § 29-26-120 is to prevent or hinder plaintiffs, especially poor plaintiffs, from obtaining effective assistance of counsel in possibly the most adversarial, complicated, and formal civil court proceeding.

Even if limitations on attorney fees affect health care costs, why should poor malpractice victims alone bear the

burden of achieving that goal by being excluded at the courthouse door? Petitioner contends that such a statutory scheme warrants review by the Honorable Court.

CONCLUSION

For the foregoing reasons, Petitioner most respectfully prays that its petition for a Writ of Certiorari be granted.

Respectfully Submitted,

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Attorney for Petitioner

APPENDIX 1

IN THE SUPREME COURT OF TENNESSEE AT JACKSON

WILLIAM P. NEWTON, Plaintiff-Appellant, ATTORNEY GENERAL, STATE OF TENNESSEE, Intervenor-Appellee, VS. JAMES S. COX, Defendant-Appellee.	**FOR PUBLICATION** **Filed: May 9, 1994** SHELBY EQUITY HON. JOE C. MORRIS, CHANCELLOR No. 02-S-01-9302-CH-00007

For Appellant:
James F. Schaeffer, Jr.
Memphis, Tennessee

For Intervenor-Appellee:
Charles W. Burson
Attorney General & Reporter
and
Sue A. Sheldon
Assistant Attorney General
Nashville, Tennessee

For Defendant-Appellee:
Robert L. Green
Memphis, Tennessee

OPINION

REVERSED AND REMANDED. **Anderson, J.**

We granted this application to determine whether the Medical Malpractice Claims Act, which regulates contingent attorney fee contracts, establishes a cause of action

for its violation.[1] A second question is whether the Act violates the United States or Tennessee Constitutions. The Court of Appeals held that the statute is directed to the judiciary and, therefore, no cause of action is available against an attorney for its violation. As a result, they did not reach the constitutional issues. We have determined that the statute does establish a cause of action for its violation. Accordingly, the attorney fee contract in this case is voidable because it violates the public policy enunciated by the statute. We also conclude that the statute does not violate the United States or Tennessee Constitutions.

FACTUAL BACKGROUND

In February 1984, plaintiff William P. Newton underwent an angioplasty procedure in Baptist Hospital in Memphis, Tennessee. During the procedure, he suffered an air embolism of the brain which caused him to become comatose. Newton was rushed to Duke University Hospital by air ambulance for treatment in a hyperbaric chamber to dissolve the air in the brain. Thereafter, he was transported to Emory University in Atlanta for rehabilitation. While at Emory, William P. Newton and his wife, Shirley Newton, employed the defendant attorney, James S. Cox, to represent them in a medical negligence case, which they alleged arose out of the angioplasty procedure. On March 25, 1984, Newton and his wife signed a contingency fee contract with Cox which provided that:

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[1] Tenn. Code Ann. § 29-26-120.

> [i]t is agreed to pay the law firm of James S. Cox and Associates a sum equal to the following: Fifty (50%) percent of the gross proceeds of recovery by compromise before litigation; or fifty (50%) percent after litigation is instituted and filed.

Cox did not advise Newton or his wife of the existence of Tenn. Code Ann. § 29-26-120, which provides as follows:

> Compensation for reasonable attorneys' fees in the event an employment contract exists between the claimant and his attorney on a contingent fee arrangement shall be awarded to the claimant's attorney in a malpractice action in an amount to be determined by the court on the basis of time and effort devoted to the litigation by the claimant's attorney, complexity of the *claim* and other pertinent matters in connection therewith, not to exceed thirty-three and one-third (33 1/3%) percent of all damages awarded to the claimant. (Emphasis added).

In June 1984, Cox filed a medical malpractice complaint on behalf of Newton against Baptist Hospital and Dr. Samaha, who performed the angioplasty procedure, alleging medical negligence which resulted in Newton's injuries and damages. In June 1985, the medical malpractice claim was settled for $225,000. In accordance with the fee contract, Cox received an attorney fee of 50 percent of the gross proceeds of the settlement, or $112,500.

Shortly after the settlement, Newton and his wife began divorce proceedings. During the pendency of the divorce action, Newton first discovered the existence of Tenn. Code Ann. § 29-26-120. As a result, Newton filed suit against Cox seeking to recover $37,500 plus interest,

the difference between the 50 percent attorney fee ($112,500) provided for in the contract and the 33 1/3 percent maximum attorney fee ($75,000) set out in the statute.

Cox admitted that the attorney fee charged was in excess of the 33 1/3 percent set out in the statute, but asserted that the statute was unconstitutional. After a bench trial, the trial court ruled that the statute was unconstitutional because it violated the defendant's rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution and Article I, § 8 and Article XI, § 8 of the Tennessee Constitution, and because it violated the separation of powers provisions of Article II, §§ 1 and 2, and Article VI, § 1 of the Tennessee Constitution.

The Court of Appeals did not reach the constitutional issues because it held that the statute "directs its mandate to the trial court as to what the court should do in setting a reasonable fee, rather than to the attorney." Accordingly, the Court of Appeals held that the plaintiff had no cause of action against the defendant pursuant to this statute. We granted the application to determine the important questions raised in this appeal.

APPLICABILITY OF TENN. CODE ANN. § 29-26-120

The plaintiff Newton argues that as a member of the public, he is clearly within the class of persons intended to be the beneficiary of Tenn. Code Ann. § 29-26-120, and that a cause of action exists for the statute's violation. Moreover, according to Newton, the statute which limits attorneys' contingency fees in medical malpractice claims

was intended by the Legislature to increase the damages injured citizens received as a result of medical malpractice.

On the other hand, the defendant Cox argues that a fair and reasonable construction of the statute is that it does not place any limitation upon the percentage of recovery that an attorney may contract for in a contingent fee contract in a medical malpractice action. Rather, it imposes a duty on the trial courts only to determine a reasonable attorney fee in cases where there is a contingent fee contract in a medical malpractice action. As a result, there is no cause of action against an attorney who violates the statute.

The Medical Malpractice Review Board and Claims Act was enacted in 1975 by the Legislature to contain the cost of medical malpractice litigation because of the perceived medical malpractice insurance crisis that existed at that time. *See Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn. 1978). The Act contained a number of restrictive measures, including a statute of repose, limitations on expert testimony, a collateral source rule, and the limitation on attorneys' fees. As we noted in *Harrison*, the Legislature saw the Act as a means of controlling the cost of health care and benefiting the general welfare of the State's citizens.[2]

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[2] The cause of the medical malpractice insurance crisis of the 1970s; its reoccurrence in the 1980s; and the legislative solutions adopted have been the subject of controversy and debate. *See* Sanders and Joyce, *"Off to the Races:" The 1980s Tort Crisis and the Law Reform Process*, 27 Hous. L. Rev. 207 (1990). For our purposes, the only question is whether the Legislature could

At the time of its enactment in 1975, Tenn. Code Ann. § 29-26-120 provided that attorneys fees were to be awarded to the claimant's attorney in a malpractice action on the basis of the complexity of the "case." The following year, the statute was amended by deleting the word "case" and substituting the word "claim." A narrow application of the word "case" could describe litigation only, while a broader construction could encompass a cause of action from its inception. "Claim," however, is clearly a broader term encompassing a cause before litigation is filed, as well as after. The guiding principle of statutory construction is to give effect to the legislative intent. *Long v. Stateline Sys., Inc.*, 738 S.W.2d 622, 623 (Tenn. 1985). Considering the plain language of the statute without any forced or subtle construction which would extend or limit its meaning, and the amendment to the statute inserting a more comprehensive term, we conclude that the Legislature intended for the statute to apply to all malpractice claims, including settlements before and after litigation is filed. *See State, ex rel. Metropolitan Gov't of Nashville and Davidson County v. Spicewood Creek Watershed Dist.*, 848 S.W.2d 60, 62 (Tenn. 1992). It is clear that the Legislature, through the enactment of this statute, has established that the policy of this state shall be that attorneys in medical malpractice cases entering into contingent fee contracts are to receive no more than 33 1/3 percent of the gross recovery of a malpractice claimant as an attorney fee. Tenn. Code Ann. § 29-26-120,

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reasonably conceive of a relationship between the statute and its purpose.

therefore, applies to the present case as an enunciation of the public policy of this state.

Having concluded that the statute here under consideration represents a declaration of the public policy of this State, we must next determine whether a contract in contravention of that statute is "void" or "voidable." It is widely recognized that

> [a] void contract is no contract at all; it binds no one and is a mere nullity. Accordingly, an action cannot be maintained for damages for its breach. No disaffirmance is required to avoid it, and it cannot be validated by ratification . . . . A contract wholly void is void as to everybody whose rights would be affected by it if valid.

17A Am.Jur.2d *Contracts* § 7 (1991)(footnotes omitted).

In contrast,

> a voidable contract is one where one or more parties have the power . . . to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance. Accordingly, a voidable contract is valid and binding until it is avoided by the party entitled to avoid it.

Id.

The prevailing view which has also been applied in Tennessee is that contracts are voidable and not void when they violate statutes enacted for the protection of the public interests or for the protection of the class of persons of which the party seeking to avoid the contract is a member. *Herbert v. W.G. Bush & Co.*, 42 Tenn. App. 1, 298 S.W.2d 747, 752 (1956); *Palmer Bros. v. Havens*, 29

Tenn. App. 8, 193 S.W.2d 91, 92 (1945); *see generally* 17A Am.Jur.2d *Contracts* § 251 (1991).

The contract at issue here violates a statute that was enacted both for the protection of the public and for the protection of medical malpractice claimants, a class of persons of which plaintiff is a member. Accordingly, the plaintiff's cause of action to avoid the contingent fee contract to the extent that it contravenes the statute is cognizable and proper. *See Herbert v. W.G. Bush & Co., supra* (if a contract is against the public policy, a court will enter a decree to protect the public interests); *Palmer Bros. v. Havens, supra* (where a contract is violative of public policy, a court may set aside an executed contract and order repayment of money paid on the contract).

CONSTITUTIONALITY OF TENN. CODE ANN. § 29-26-120

Equal Protection

The defendant contends that Tenn. Code Ann. § 29-26-120 violates the equal protection provisions of the Fourteenth Amendment to the United States Constitution and the equal protection provisions of the Tennessee Constitution, Article 1, § 8 and Article 11, § 8. While recognizing that "[t]he equal protection provisions of the Tennessee Constitution and the Fourteenth Amendment are historically and linguistically distinct," this Court has followed the framework developed by the United States Supreme Court for analyzing equal protection claims. *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 152-54 (Tenn. 1993). In that case, we stated:

> [The Supreme Court] has utilized three standards of scrutiny, depending upon the right asserted. *See City of Memphis v. International Brotherhood of Elec. Workers Union*, 545 S.W.2d 98, 101 (Tenn. 1976), (reduced scrutiny); *Mitchell v. Mitchell*, 594 S.W.2d 699, 701 (Tenn. 1980) (heightened scrutiny); *Doe v. Norris*, 751 S.W.2d [834,] at 840 (strict scrutiny).

Tennessee Small School Systems v. McWherter, supra, 851 S.W.2d at 153.

> The concept of equal protection espoused by the federal and of our state constitutions guarantees that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 562, 64 L. Ed. 989 (1920); *see Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382 72 L. Ed. 2d 786 (1982); *State ex rel Dept. of Social Services v. Wright*, 736 S.W.2d 84 (Tenn. 1987). Conversely, things which are different in fact or opinion are not required by either constitution to be treated the same. *Plyler v. Doe, supra*, 457 U.S. at 216, 102 S. Ct. at 2394. "The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States," and legislatures are given considerable latitude in determining what groups are different and what groups are the same. *Id.* In most instances the judicial inquiry into the legislative choice is limited to whether the classifications have a reasonable relationship to a legitimate state interest. *Id.; see State v. Southern Fitness and Health, Inc.*, 743 S.W.2d 160, 164 (Tenn. 1987); *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978).

Tennessee Small School Systems v. McWherter, supra, 851 S.W.2d at 153 *citing Doe v. Norris, supra,* 751 S.W.2d at 840.

Equal protection analysis requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a "fundamental right" or operates to the peculiar disadvantage of a "suspect class." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed.2d 16 (1973).

We have previously held that medical malpractice litigants are not members of a suspect class. *Sutphin v. Platt,* 720 S.W.2d 455 (Tenn. 1986). Moveover [sic], notwithstanding defendant's assertion, it is obvious that attorneys affected by Tenn. Code Ann. § 29-26-120 are not those who have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," and thus be denominated a "suspect class." *San Antonio Independent School District v. Rodriguez, supra,* 93 S.Ct. at 1294.

Furthermore, while the ability to enter into contracts is a "right," it is not a fundamental right which would trigger strict scrutiny analysis. *See e.g., Broadwell v. Holmes,* ___ S.W.2d ___ (Tenn. 1994) (parental right to govern the rearing of a child); *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to interstate travel); *Griswald v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (right to procreate).

This Court has consistently held that the rational basis test is the appropriate analysis to be employed

when determining the constitutionality of medical malpractice statutes. *See Sutphin v. Platt, supra,* 720 S.W.2d at 457 (contiguous state limitation upon medical experts in medical malpractice cases); *Harrison v. Schrader, supra,* 569 S.W.2d at 825 (medical malpractice statute of repose).

Under the rational basis standard, "[i]f some reasonable basis can be found for the classification [as set out in the statute], or if any state of facts may reasonably be conceived to justify it, the classification will be upheld." *Tennessee Small School Systems v. McWherter, supra,* 851 S.W.2d at 153.

Most courts in other jurisdictions which have considered this issue and have applied this analysis to medical malpractice contingency fee statutes have upheld the statutes on equal protection grounds. *See, e.g., Johnson v. St. Vincent Hosp., Inc.,* 404 N.E.2d 585, 602-603 (Ind. 1980) ("The disparate treatment accorded plaintiffs and counsel in medical malpractice cases is the natural consequent [sic] of the fact that the Legislature sought in this act to protect the public interest adversely being affected by a curtailment of malpractice insurance for health care providers."); *DiFilippo v. Beck,* 520 F. Supp. 1009, 1016 (D. Del. 1981) ("Similarly, it is rational to limit attorneys' fees which may be collected in malpractice suits and not in other actions because the limitation is also related to reducing malpractice insurance costs and, consequently, medical costs."; *Roa v. Lodi Medical Group, Inc.,* 695 P.2d 164, 170 (Cal. 1985), *cert dismissed,* 474 U.S. 990, 106 S.Ct. 421, 88 L.Ed.2d 351 (1985) ("[T]he legislature could reasonably have determined that the provision would serve to reduce malpractice insurance costs.")

We recognize that the New Hampshire Supreme Court found that a similar statute was unconstitutional, on the basis that there was no direct evidence in that case showing the relationship between the statutory classifications and the purposes of the legislation. *Carson v. Maurer*, 424 A.2d 825, 838-39 (N.H. 1980).

However, under the rational basis test, it is not necessary that there be specific evidence presented to show the relationship between the statute and the purpose of the Medical Malpractice Act. The proper analysis is whether the legislature could conceive of a relationship between the statute and the purpose of the Act. It is conceivable that the General Assembly concluded that the contingency fee cap of Tenn. Code Ann. § 29-26-120 would further the purposes of the Medical Malpractice Act by reducing malpractice insurance costs and, therefore, reduce the cost of health care to the public. Applying this rational basis analysis, we hold that Tenn. Code Ann. § 29-26-120 does not violate the equal protection provisions of the Tennessee or United States constitutions.

Due Process

The defendant argues that the trial court was correct in finding that Tenn. Code Ann. § 29-26-120 violates the due process provisions of the United States and Tennessee constitutions. Specifically, the defendant alleges that the statute violates due process because "it deprives private citizens of their unalienable [sic] right to contract," and "it deprives an attorney representing a client in a medical malpractice cause of action of the freedom of

contract without a substantial relation to a legitimate government purpose."

This Court has previously held that the "law of the land" provision of Article I, § 8 of the Tennessee Constitution is synonymous with the due process clause of the Fourteenth Amendment to the United States Constitution. *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 786 (Tenn. 1980). Unless a fundamental right is involved, the test for determining whether a statute comports with substantive due process is whether the legislation bears "a reasonable relation to a proper legislative purpose" and is "neither arbitrary nor discriminatory." *Nebbia v. New York*, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934); *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 105 S. Ct. 1441, 84 L.Ed.2d 432 (1985). The right to contract is not unalienable [sic] or absolute, but it is subject to curtailments, limitations, or destruction by the legislature when done by proper classification. *Daugherty v. State*, 216 Tenn. 666, 393 S.W.2d 739 (1966) *cert. denied*, 384 U.S. 435, 86 S. Ct. 1601, 16 L.Ed.2d 671 (1966). Since the statute does not impinge upon a fundamental right, it does not violate the defendant's due process rights under either the state or federal constitutions because it is not arbitrary nor discriminatory, and bears a reasonable relation to a proper legislative purpose, the General Assembly's desire to ameliorate the medical malpractice crisis.

Separation of Powers

Finally, the defendant contends that the trial court properly held that Tenn. Code Ann. § 29-26-120 violates

the "separation of powers" provisions of the Tennessee Constitution. Article II, §§ 1 and 2 of the Tennessee Constitution provide that the powers of the government are divided into the legislative, executive and judicial branches. None of the three branches may exercise any of the powers properly vested in either of the others. Article VI, § 1 vests the judicial power of this state in the Supreme Court and inferior courts.

The authority of this Court to make rules governing the practice of law is derived from this judicial power. *Barger v. Brock,* 535 S.W.2d 337 (Tenn. 1976). We have implemented this authority by adopting a set of rules governing the practice of law, including Rule 8 which establishes the Code of Professional Responsibility. Disciplinary Rule 2-106(A) provides that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Subsection (B) of Disciplinary Rule 2-106 provides a list of factors to be considered in determining the reasonableness of a fee.

It is defendant's contention that when the legislature enacted Tenn. Code Ann. § 29-26-120, it encroached upon the power of the judiciary to control the conduct of attorneys. Specifically, defendant argues that Tenn. Code Ann. § 29-26-120 is in direct conflict with Disciplinary Rule 2-106. We disagree.

This Court has previously recognized that areas exist in which both the legislative and judicial branch have interests, and that in such areas both branches may exercise appropriate authority. For example, in *Petition for Rule of Court Activating, Integrating, and Unifying the State Bar of Tennessee,* 199 Tenn. 78, 282 S.W.2d 782 (1955), this

Court upheld the constitutionality of the statute which prohibited any individual being denied admission to the bar on the basis of his or her not belonging to any club, association, or guild. We stated:

> The inherent right of Courts to prescribe qualifications necessary for the practice of law does not mean that the Legislature is without authority in that field . . . . Thus, a legislative requirement that individuals who would practice this profession must first meet certain reasonable conditions and qualifications is only the exercise by the Legislature of the police power with which that department of our government is vested.

Id. at 784.

On the other hand, in situations where the legislative enactment is in direct conflict with and totally abrogates the Court's authority with regard to the practice of law, the statute is unconstitutional. For example, in *Cantor v. Brading*, 494 S.W.2d 139 (Tenn. App. 1973), the Court of Criminal Appeals struck down a statute which allowed attorneys who had been permanently disbarred to seek re-admission after a specified period of time. The intermediate appellate court determined that the statute directly contravened the operation of the Court's authority in admitting and supervising attorneys. *Id.*, 143.

Just a year later, in *Belmont v. Board of Law Examiners*, 511 S.W.2d 461 (Tenn. 1974), this Court struck down a statute which provided that no licensing agency for any profession could adopt or enforce a rule which limited the number of times that a person could apply for and

take a licensing examination. The statute directly contravened a rule of this Court limiting the number of times an individual could take the bar examination. We found that the "act of the legislature [was not] in aid of the inherent power of the judiciary, . . . but one that conflicts with and supersedes the Court's declared requirements, and constitutes an attempted exercise of powers properly belonging to the judicial branch by the legislative branch . . . . " *Id.* at 464.

In this case, however, the statute is supplemental to and in aid of Disciplinary Rule 2-106(A). We, therefore, view the statute at issue here as an exercise of the legislature's police powers, intended to protect the public. Since the statute does not directly conflict with the Supreme Court's authority to regulate the practice of law, and because it is designed to declare the public policy with respect to attorney fee contracts, we hold that it does not unconstitutionally impinge upon the Supreme Court's authority to regulate the practice of law. Accordingly, Tenn. Code Ann. § 29-26-120 does not violate the Tennessee Constitution's "separation of powers" principle.

CONCLUSION

In conclusion, we hold that Tenn. Code Ann. § 29-26-120 is a constitutional declaration of the public policy of this state with regard to contingency attorney fee contracts in medical malpractice cases. Since the contract entered into between plaintiff and defendant violates this statute and hence the public policy of this state, we find that it was voidable. Plaintiff's suit to avoid the contract should have been allowed. Accordingly, the

Court of Appeals is reversed and the case is remanded to the trial court for proceedings consistent with this Opinion. Costs of the appeal are taxed against the defendant, James S. Cox.

/s/ Riley Anderson
RILEY ANDERSON, Justice

CONCUR:

Reid, C.J.
Drowota and O'Brien, JJ.

Daughtrey, J., Not Participating

SUPREME COURT, JACKSON

WILLIAM P. NEWTON, Plaintiff/Appellant	)	Appeal No. No. [sic] 02-S-01-9302-CH-00007
ATTORNEY GENERAL, STATE OF TENNESSEE, Intervenor/Appellee	)	Shelby Equity No. 95025-3
VS.	)	
JAMES S. COX, Defendant/Appellee.	)	Court of Appeals Reversed and Cause Remanded

JUDGMENT

This cause came on to be heard upon the record on appeal from the Court of Appeals, Western Section at Jackson, briefs and argument of counsel; and upon consideration thereof, this Court finds that the plaintiff has stated a cause of action to avoid the attorney fee contract and that the statute regulating medical malpractice attorney fees is constitutional.

In accordance with the opinion filed herein, it is, therefore, ORDERED AND ADJUDGED by this Court that the judgment of the Court of Appeals is reversed, and the case is remanded to the Equity Court of Shelby County for further necessary proceedings, consistent with this Court's opinion, and for collection of costs accrued below.

Costs of appeal will be paid by James S. Cox, for which execution may issue if necessary.

5/9/94

APPENDIX 2

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

WILLIAM P. NEWTON, Plaintiff/Appellant, ATTORNEY GENERAL, STATE OF TENNESSEE, Intervenor/Appellant, v. JAMES S. COX, Defendant/Appellee.	)	Shelby Chancery No. 95025-3 No. 02A01-9202-CH-000041 Hon. Joe C. Morris, Chancellor

JAMES F. SCHAEFFER, JR., Memphis, Attorney for Plaintiff.

CHARLES W. BURSON, Attorney General, JERRY W. TAYLOR, Assistant Attorney General, Nashville, for State of Tennessee.

ROBERT L. GREEN, Neely, Green, Fargarson & Brooke, Memphis, Attorney for Defendant.

AFFIRMED.

Opinion filed: SEP 14 1992

TOMLIN, P.J., W.S.

William P. Newton ("plaintiff") filed suit against James S. Cox ("defendant"), his former attorney, in the Chancery Court of Shelby County. Plaintiff alleged that defendant violated T.C.A. § 29-26-120 by charging plaintiff and his former wife a contingent fee in a medical

malpractice action in an amount greater than 33 1/3% of the amount of the settlement. In an amended complaint, plaintiff alleged that defendant's actions were in violation of the Tennessee Consumer Protection Act (TCPA), T.C.A. § 47-18-101, *et seq.* Defendant's answer denied the illegality of the contract. In addition, defendant contended T.C.A. § 29-26-120 violated the Separation of Powers clause of the Tennessee Constitution and the Due Process clauses of the Tennessee and United States Constitutions. Defendant also contended that the Tennessee Consumer Protection Act did not apply to the practice of law, but that if it did, it was time-barred by the statute of repose contained in the Act. The Attorney General intervened at the trial level for the limited purpose of defending the constitutionality of the challenged statute.

The Attorney General presents three issues for review: whether the trial court erred in: (1) concluding that T.C.A. § 29-26-120 is unconstitutional because it violates the Due Process and Equal Protection clauses of the U.S. and the Tennessee Constitutions; (2) concluding that T.C.A. § 29-26-120 is unconstitutional because it violates the Separation of Powers provision of the Tennessee Constitution; and (3) allowing into evidence opinion testimony of an active and a retired Shelby County circuit court judge as to the constitutionality of T.C.A. § 29-26-120.

In addition to the above three issues, plaintiff raises the following: whether the trial court erred in ruling that: (1) the Tennessee Consumer Protection Act was inapplicable; and (2) the action of plaintiff brought pursuant to the Tennessee Consumer Protection Act was time-barred. We are of the opinion that it was unnecessary for the trial

court to ever reach the issue of the constitutionality of T.C.A. § 29-26-120. We hold that § 29-26-120 does not apply to or control the conduct of individual attorneys, but is directed to the judiciary. As for the claim asserted under the TCPA, we are of the opinion that the Act does not apply, but if it does, by the terms of the Act itself the action is time-barred.

The relevant facts are undisputed. In February, 1984, plaintiff was admitted to a Memphis hospital for an angioplasty procedure. He suffered a stroke during this procedure. While plaintiff was undergoing rehabilitation therapy, he and his wife discussed employing an attorney in Memphis to explore the possibilities of a medical malpractice action against the hospital and/or certain Memphis doctors. Mrs. Newton consulted defendant about representing her and plaintiff. The ensuing negotiations concluded with defendant presenting to plaintiff an employment contract for his services to bring a medical malpractice action, calling for a contingent fee of 50% of any settlement or judgment. Both plaintiff and his wife signed the contract of employment.

Defendant filed a medical malpractice suit on behalf of plaintiff and his wife in June, 1984. The case was ultimately settled for $225,000.00. Plaintiff and Mrs. Newton were fully cognizant that the 50% fee would be taken out of the amount of settlement. It was undisputed that plaintiff and Mrs. Newton were quite satisfied with the representation provided by defendant and members of his staff. Defendant admitted that at no time during the course of his representation of plaintiff did he ever advise plaintiff or Mrs. Newton about the provisions of T.C.A. § 29-26-120.

In 1986, plaintiff and Mrs. Newton obtained a divorce. In that proceeding, the trial court ruled that the medical malpractice settlement constituted separate property of the plaintiff. Mrs. Newton was awarded a small portion of the settlement for her loss of consortium. It was during the pendency of the divorce proceedings that plaintiff learned of the existence of § 29-26-120. He obtained legal counsel, who filed the case at bar against defendant, seeking to recover the difference between the 50% fee and the 33 1/3% limitation imposed by the statute.

The Chancellor found in part as follows:

> (1) The provisions of T.C.A. 29-26-120 are unconstitutional in that they violate the defendant's Right to Due Process and Equal Protection under the 14th Amendment to the United States Constitution and Article I, Section 8 and Article XI, Section 8 of the Constitution of the State of Tennessee and that T.C.A. 29-26-120 violates the Separation of Powers provisions of Article II, Sections 1 and 2 and Article VI, Section I of the Constitution of the State of Tennessee; and
>
> (2) The provisions of T.C.A. 47-18-104(b) are inapplicable to the practice of law but even if they were applicable they were not violated and in any event this cause of action was time barred.

I. THE CONSTITUTIONAL ISSUE

It is well settled in this state that a court will not pass on the constitutionality of a statute, or any part of one,

unless it is absolutely necessary for the determination of the case and the present rights of the parties under the litigation. *General Portland, Inc. v. Chattanooga-Hamilton Co., etc.*, 560 S.W.2d 910, 914. *See also, State v. Murray*, 480 S.W.2d 355 (Tenn. 1972); *West v. Carr*, 212 Tenn. 367, 370 S.W.2d 469 (1963). Since this case can be disposed of on a non-constitutional issue, that of statutory construction and application, we do not, and should not, reach a constitutional issue. *Watts v. Memphis Transit Management*, 462 S.W.2d 495, 498 (Tenn. 1971); *Bah v. Bah*, 668 S.W.2d 663, 668 (Tenn. App. 1983).

The statute in question – T.C.A. § 29-26-120 – reads as follows:

> Attorneys' fees. – Compensation for reasonable attorneys' fees in the event an employment contract exists between the claimant and his attorney on a contingent fee arrangement shall be awarded to the claimant's attorney in a malpractice action in an amount to be determined by the court on the basis of time and effort devoted to the litigation by the claimant's attorney, complexity of the claim and other pertinent matters in connection therewith, not to exceed thirty-three and one-third percent (33 1/3%) of all damages awarded to the claimant.

Legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the language used, when read in the context of the entire act or statute, without any forced or subtle construction to limit or extend the import of that language. *Oliver v. King*, 612 S.W.2d 152 (Tenn. 1981). By its language, § 29-26-120 addresses action to be carried out by the trial court in which a medical malpractice action is pending. Nowhere

in the statute does it seek to control or govern the actions of an attorney who might have a contingent fee contract with the plaintiff.

Both our Supreme Court as well as federal district courts in this state have recognized that one of the legislative purposes of the Tennessee Medical Malpractice Act (of which this code section is a part) was to cope with the "medical malpractice insurance crisis" – i.e., extremely high premiums for or unavailability of malpractice insurance. *See Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn. 1978); *Baker v. Vanderbilt University*, 616 F.Supp. 330, 332 (M.D. Tenn. 1985). The Tennessee Medical Malpractice Act is a series of measures that were intended to contain the cost of medical malpractice litigation and the amount of judgments in such cases.

We take judicial notice of the fact that there was a medical malpractice explosion throughout this country coincident with that in Tennessee, and that many states initiated legislative action to cope with it. Our research has turned up no statute strikingly similar to that in the case under consideration, wherein the *courts* sought to apply such a statute to acts of attorneys. Rather, those we have encountered directly regulate and control the attorney's actions in contracting for services without the intervention of the court.

We note the following: New Hampshire Rev. Stat. Ann. § 507-C:8 reads in pertinent part as follows:

> I. In any action for medical injury, no attorney representing any party to such action shall contract for, charge or collect on a contingent fee

basis any fee for his services to such party in excess of the following limits: . . .

II. No attorney shall enter into such a contingent fee arrangement with his client without first advising the client of his right and affording the client an opportunity to retain the attorney under an arrangement whereby the attorney would be compensated on the basis of the reasonable value of his services . . .

Calif. Bus. and Prof. Code § 6146 reads in pertinent part:

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits . . .

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment . . .

40 P.S. § 1301.604 of the State of Pennsylvania provides as follows:

Attorney's fees.

(a) When a plaintiff is represented by an attorney in the prosecution of his claim the plaintiff's attorney's fees from any award made from the first $100,000.00 cannot exceed 30%, from the second $100,000.00 attorney fees may not exceed 25%, and attorney fees may not exceed 30% on the balances of any award.

(b) A plaintiff has the right to elect to pay for the attorney's service on a mutually satisfactory per diem basis. The election, however, must

> be exercised in written form at the time of employment.

The limitation placed upon attorney fees by the state of Indiana is found in the Indiana Code § 16-9.5-5-1, which provides as follows:

> (a) When a plaintiff is represented by an attorney in the prosecution of his claim, the plaintiff's attorney fees from any award made from the patient's compensation fund may not exceed fifteen per cent of any recovery from the fund.
>
> (b) A patient has the right to elect to pay for the attorney's services on a mutually satisfactory per diem basis. The election, however, must be exercised in written form at the time of employment.

For a general survey of fee limitations statutes in medical malpractice cases, *see Bernier v. Burris*, 497 N.E.2d 763, 778 (Ill. 1986).

We do not purport to say that every state's statute seeking to regulate attorney fees in medical malpractice cases are fashioned in the manner of those set forth above. However, we do cite them as examples of statutes that are clearly written to govern and relate to the conduct of an attorney in entering into a client a [sic] contingent fee contract in such cases. By contrast, the statute called into question in the case under consideration is quite different in that it directs its mandate to the trial court as to what the court should do in setting a reasonable fee, rather than to the attorney. For the foregoing reasons, we are of the opinion that under the facts of this

case, § 29-26-120 is inapplicable. Plaintiff has no claim against defendant pursuant to this statute.

II. THE TENNESSEE CONSUMER PROTECTION ACT CLAIM

In his amended complaint plaintiff alleged that defendant committed an unfair or deceptive act as prohibited by TCPA, §§ 47-18-101 *et seq.*, specifically, § 47-18-104(a) and (b)(26). Subsection (a) simply declares unlawful "unfair or deceptive acts or practices affecting the conduct of any trade or commerce." Subsection (b)(26) declares unlawful the "engaging in any other act or practice which is deceptive to the consumer." In its order, the trial court held that the provisions of § 47-18-104(b) were inapplicable to the practice of law, but even if applicable, plaintiff's cause of action under the T.C.P.A. was time-barred.

Plaintiff contends that the trial court was in error. However, in his brief he does not cite to this court any testimony that would in any way establish that the practice of law in this state is considered to be a trade or commerce under the Act. Furthermore, he cites no cases from this jurisdiction or any other where an appellate court has so held.

T.C.A. § 47-18-110 provides as follows:

> **47-18-110. Limitations of actions.** – Any action commenced under the provisions of this part shall be brought within one (1) year from a person's discovery of the unlawful act or practice, but in no event shall an action under this part be brought after four (4) years from the

> date of the consumer transaction giving rise to the claim for relief.

Applying this statute of repose to the facts of the case under consideration, the consumer transaction that plaintiff alleges gives rise to relief under TCPA is the withholding of a 50% attorney fee from the settlement that took place on June 14, 1985. Plaintiff's claim for relief under the TCPA was first asserted in his amended complaint filed in August, 1990, which is clearly more than four years after the date of the occurrence of the "consumer transaction."

This court is of the opinion that the plaintiff failed to carry his burden of proof to establish that the TCPA is applicable under the facts of this case. However, in the event that we are in error, we are also of the opinion that if applicable, his claim is time-barred by the four year statute of repose found in 47-18-110. This issue is without merit.

III. THE TRIAL JUDGES AS WITNESSES

Judge Wyeth Chandler, a sitting circuit judge in Shelby County, and Judge Charles O. McPherson, a now retired circuit judge of Shelby County, were subpoenaed to testify on behalf of defendant.

Some six months prior to trial, the Attorney General filed a motion *in limine*, asking the trial court to exclude expert testimony by certain judges expected to be called by defendant. In the *in limine* motion, the Attorney General cited, as grounds for the position taken, *Tennessee Rules of Evidence*, §§ 702 and 704, along with caselaw. No response to the motion *in limine* was filed by defendant,

nor did the trial court act upon it until one of the judges was offered as a witness at trial and an objection was made by the Attorney General. The trial court denied the motion *in limine* and overruled the objection at the same time.

We note that both the plaintiff and the Attorney General have raised this issue in this court in their respective briefs. However, there is no response of any sort in defendant's brief to this issue. While under the circumstances we feel that defendant waived this issue and therefore it should be resolved in favor of plaintiff, we nonetheless feel the need to address it.

Aside from the applicability of the Tennessee Consumer Protection Act, the trial court dealt with the applicability and constitutionality of T.C.A. § 29-26-120. When permitted to testify, Judge Chandler testified that he was unaware that 29-26-120 was still a part of T.C.A., being of the opinion that it might have been repealed along with other sections of the Medical Malpractice Act. He stated that he had only utilized the statute in cases where the plaintiff was either a minor or an incompetent. While not specifically testifying as to the constitutionality of the statute, he did state that he felt it was an encroachment by the legislature into an area that should be left to the regulation of the judiciary.

Retired Judge McPherson, while not stating directly that the act was unconstitutional, testified that he had only utilized the statute in cases involving minors and incompetents. Judge McPherson was permitted to testify that, in his opinion, the statute was an encroachment by

the legislature on the power of the judiciary to regulate the practice of attorneys.

We are of the opinion that it was error on the part of the court to permit this testimony. First, as a matter of philosophy, presenting judges as witnesses should be done with great care and in the most limited circumstances. Clearly, they were being offered as expert witnesses, and, in that regard, they could certainly be qualified as such. However, Rules of Evidence 702 and 704, the statutory basis under which they might be offered, specifies the circumstances under which an expert may testify to fact issues. Here, the issue under consideration is purely one of law. In addition, their testimony was irrelevant. Their actions in their courts as to the application of a statute to a set of circumstances are immaterial.

Both judges were subpoenaed. Without an order of the court quashing the subpoenas, they were obliged to appear and to answer questions posed to them by trial counsel. In a timely fashion, the Attorney General sought to limit their testimony and gave the court adequate legal authority to support the State's petition. Defendant made no response. The trial court erred when it did not act timely upon the motion *in limine* to deny it.

For the foregoing reasons, the order of the trial court declaring the provisions of T.C.A. § 29-26-120 to be unconstitutional as a violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 and Article XI, Section 8 of the Constitution of the State of Tennessee as well as Article II, Sections 1 and 2 and Article VI, Section 1 of the Constitution of the State

of Tennessee is reversed. In all other respects, the judgment is affirmed. Costs in this cause on appeal are taxed to plaintiff, for which execution may issue if necessary.

/s/ Tomlin
TOMLIN, P.J., W.S.

/s/ Highers
HIGHERS, J.
(CONCURS)

/s/ Farmer
FARMER, J.
(CONCURS)

APPENDIX 3

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

WILLIAM P. NEWTON,	)	
Plaintiff,	)	
	)	
vs.	)	NO. 95025-3
	)	
JAMES S. COX,	)	
	)	
Defendant.	)	

ORDER

This cause came on to be heard upon the original Complaint filed on behalf of the plaintiff, William P. Newton, the Answer filed on behalf of the defendant, James S. Cox, and the Response of the State of Tennessee to the challenge to the constitutionality of T.C.A. 29-26-120, the sworn testimony of the parties and witnesses, the deposition filed in the cause, the statements and argument of counsel for the plaintiff, the defendant and the State of Tennessee and upon the entire record in the cause, from all of which the Court made the Findings of Fact previously filed in the cause, which Findings are incorporated by reference but need not be copied in this Order, and based upon all of the aforesaid proof adduced in the hearing of this cause, the Court finds that the provisions of T.C.A. 29-26-120 are unconstitutional because they violate the Defendant's Right to Due Process and Equal Protection under the 14th Amendment to the United States Constitution and Article I, Section 8 of the Constitution of the State of Tennessee and that T.C.A.

29-26-120 violates the Separation of Powers provisions of Article II, Section 1 and 2 and Article VI, Section 1 of the Constitution of the State of Tennessee.

The Court further finds that the provisions of T.C.A. 47-18-104(b) are inapplicable to the practice of law and even if applicable, said provisions were not violated and in any event, this cause of action was time barred.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that a judgment in favor of the defendant, James S. Cox, be and it hereby is entered and the complaint herein is dismissed because:

(1) The provisions of T.C.A. 29-26-120 are unconstitutional in that they violate the defendant's Right to Due Process and Equal Protection under the 14th Amendment to the United States Constitution and Article I, Section 8 and Article XI, Section 8 of the Constitution of the State of Tennesse [sic] and that T.C.A. 29-26-120 violates the Separation of Powers provisions of Article II, Sections 1 and 2 and Article VI, Section 1 of the Constitution of the State of the Tennessee; and

(2) The provisions of T.C.A. 47-18-104(b) are inapplicable to the practice of law but even if they were applicable they were not violated and in any event this cause of action was time barred.

(3) The costs of the cause are adjudged against the plaintiff for which execution may issue if necessary.

DATED this 18th day of June, 1991.

/s/ Joe C. Morris
JOE C. MORRIS, Special Chancellor

APPROVED FOR ENTRY:

JAMES S. SCHAEFFER, JR.
Attorney for Plaintiff

/s/ Robert L. Green
ROBERT L. GREEN
Attoreny [sic] for Defendant

JERRY W. TAYLOR
Attorney for State of Tennessee

CERTIFICATE

I hereby certify that on this date I am mailing a copy of this decree to the opposing party.

/s/ Tim Killett
D.C. & M.